IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 951

CARPENTERS LOCAL UNION NO. 345 OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, and H. A. KELLUM, PRESIDENT; OTTO SCHLAFER, BUSINESS AGENT,

Petitioners,

vs.

HOWARD RUBIN, d/b/a; HOWARD RUBIN AND COMPANY

Respondents.

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

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Respondents.

REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

The respondents have been directed by the Court to file a Reply Brief to the Petition for a Writ of Certorari heretofore filed by the petitioners herein, discussing in said Reply Brief the four Supreme Court decisions listed in the citations section of this Brief.

Under the section titled "Opinions Below" appearing on Page 2 of the Petition, the petitioners recite that "the Supreme Court of Tennessee rendered no opinion in its denial of the Writ." At the time the Petition for a Writ of Certiorari was presented to this Court, this statement was correct, but subsequently, on March 30, 1964, a "Memoran-

dum Not For Filing" was forwarded to counsel for petitioners and respondents. (App.A.).

In the petitioners' Statement of the Case, they recite in the second paragraph on Page 4 of said Petition that "The Chancery Court, as is its customary procedure, considered the matter on bill and answer . . . . ." In addition, however, two sworn affidavits were filed on behalf of the respondents (App. B & B 1), which also had to be considered together with the sworn bill and answer, in accordance with the procedures of the Court.

Considering the findings of the Supreme Court of the State of Tennessee set forth in its "Memorandum Not For Filing," *supra*, respondents are of the opinion that petitioners' statement in the final paragraph under the "Statement of the Case" appearing on page 4 of said Petition "Thus there is a final order asserting jurisdiction over a subject matter which is beyond the power of the state court and instead is within the exclusive jursdiction of the National Labor Relations Board" is in error.

The respondents will now discuss the four Supreme Court decisions as requested.

The San Diego Building Trades Council, Millmen's Union, Local 2020 v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775, case is not applicable to the subject case. In Retail Clerk's International Association, Local 1625, AFL-CIO v. Schermerhorn, —— U.S.——, 84 S.Ct. 219, ——L.Ed2d ——, this Court specifically stated that the Garmon case "did not present the problems posed by §14(b), viz., whether the Congress had precluded state enforcement of select state laws adopted pursuant to its authority."

This Court, in Local No. 438 Construction and General Laborers Union v. Curry, 371 U.S. 542, 83 S.Ct. 531, 9

L.Ed.2d 514, answers in the negative the "Questions Presented" as posed by the petitioners on Page 2 of the Petition. The facts of the Curry case, however, are clearly distinguishable from the facts of the subject case. In the Curry case, it was stipulated that the respondents, Curry, et al, had purchased more than $50,000.00 worth of goods and commodities from outside the State of Georgia, and their purchases therefore met the direct inflow standards set by the NLRB for the exercise of its jurisdiction. In the subject case, the petitioners have not availed themselves of a full hearing of the matter and, therefore, the facts in this regard must be taken from the bill and answer and the affidavits filed on behalf of the respondents. The only averments made by petitioners in their answer are as follows:

> "Defendants would show that the value of the apartment being constructed is in excess of $500,000.00 and that more than $50,000.00 in value of the materials is shipped into the State of Tennessee from points outside the State of Tennessee and therefore the construction of the apartment project directly affects interstate commerce and the labor dispute comes within the exclusive jurisdiction of the National Labor Relations Board."

We are of the opinion that the value of the apartment being constructed has no consideration in determining the jurisdictional standards of the NLRB with respect to the subject case, said $500,000.00 gross volume of business test pertaining only to retail concerns. Further it will be noted that the petitioners did not aver that the $50,000.00 inflow standard had been met at the time of the filing of their answer. There is a question as to whether their averment was to the effect that the inflow standard would be met

at a time subsequent to their answer and as the job progressed. If this were the effect of their averment, however, it would be mere speculation and conjecture on their part, and on the Court's part, if it would follow same. The NLRB has explicitly refused to do so in a very similar case, Oregon Labor-Management Relations Board (Charles Lake Construction Company) 136 NLRB 1207:

> "Our determination herein is based only upon the facts submitted in the petitions. As indicated above, the testimony relating to the Employer's apartment house project had been excluded at the hearing by a ruling of the State Board, although the Union "feels" that such testimony would increase the employer's inflow to more than $50,000.00. However, the Union did not set forth any specific inflow figures relating to that project, so that the extent, if any, of the project's inflow is indefinite and speculative. Under these circumstances, this Board is unable to conclude that the project, which has not proceeded beyond the foundation stages, would have increased the Employer's annual inflow to more than $50,000.00."

The respondents, on the other hand, made sworn affidavit that the NLRB standards could not have possibly been met, inasmuch as $50,000.00 worth of goods and materials had not been purchased in toto from instate and out-of-state sources.

For the same reasons as set out in the Curry case, *supra*, N. L. Liner et.al. v. Jafco, Inc., et.al., ——U.S.——, 84 S.Ct. 391, —— L.Ed.2d ——, is distinguishable from the subject case. In the Jafco case, the proof adduced on a full hearing of the cause was that, before the hearing, Rea Construction Company, Jafco's subcontractor, had purchased outside Tennessee and brought to the site materials

costing $147,099.67. This, of course, more than met the direct inflow standards of $50,000.00 set by the NLRB for the exercise of its jurisdiction.

The Schermerhorn case, *supra*, has no direct applicability to the subject case, in that it involved a contract in esse, whereas in the subject case no contract is involved. However, the Schermerhorn case is helpful for the purpose of this Brief in its affirmation that the Garmon case, *supra*, also has no applicability to the subject case.

CONCLUSION

It is strongly urged that the petitioners have prematurely brought their Petition(s) for a Writ of Certiorari to the Supreme Court of the State of Tennessee and to this Court. If the case is allowed a full hearing on its merits in the Chancery Court, the Chancery Court, and, if necessary, at a later date, this Court, would be in a position to ascertain whether the activities of the respondents affected interstate Commerce within the purview of the NLRB jurisdictional standards. If this were found by the lower Court to be in the affirmative, the injunction would have to be dissolved by the lower Court to conform with the law promulgated in the Curry and Jafco cases. If the proof is to the negative, the injunction would be made permanent and the petitioners would have no legal support for their Petition for a Writ of Certiorari.

Respectfully Submitted,

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THOMAS, SHAINBERG & HALLIBURTON
Of Counsel

APPENDIX A

March 30, 1964

Honorable Anthony J. Sabella, Atty.
Columbian Mutual Towers Building
Memphis, Tennessee

Re: Carpenters Local Union No. 345 of the United Brotherhood of Carpenters and Joiners of America, and H. A. Kellum, President; Otto Schlafer, Business Agent
vs.
Howard Rubin, dba, Howard Rubin and Company

Dear Sir:

Enclosed please find "MEMORANDUM NOT FOR FILING" setting forth reasons why the Court refused to take jurisdiction of the above cause.

Enclosed, also, is Petition for writ of Certiorari and other relief.

Very truly yours,

Ramsey Leathers, Clerk

RL:maf
Enclosures (2)

cc: Honorable Al H. Thomas, Atty.
81 Madison Building
Memphis, Tennessee
Enclosure C

Carpenters Local Union No.
945 of the United Brotherhood
of Carpenters and Joiners of America,
and H. A. Kellum, President, Otto Schlafer,
Business Agent,
Petitioners

v.

Howard Rubin, dba, Howard
Rubin and Company,
Respondents

MEMORANDUM NOT FOR FILING

Based upon averments of fact in a sworn bill and supported by affidavits filed at the hearing, a temporary injunction was issued by the chancellor pursuant to the prayer set out in the original bill, despite the objection of the defendants of lack of jurisdiction as more specifically set out in the Plea in Abatement filed by them.

From the action of the chancellor in granting the temporary injunction on the date shown in his order, the petitioners, defendants below, filed a petition for the writ of certiorari with the member of this Court whose name appears on this memorandum. Upon consideration of said

petition by all of the members of the Court, the writ was denied and some of the reasons for such action are:

1. Under the procedural laws of this State the petitioners have a plain, speedy and adequate remedy at law, and when, in the judgment of the court, this is made to appear, as here, the writ will not lie. T.C.A. 27-801.

2. Certiorari will not be granted by this Court to review a mere interlocutory decree or order, such as a temporary injunction, as here, which the petitioners did not seek to have dissolved prior to filing the petition here where, as here, it is not shown that the petitioners are suffering irreparable injury and where the only relief sought is that of certiorari and where there is, as here, a speedy and adequate remedy at law.

3. Appeals as a matter of right lie only from final decrees under the procedural laws of this State. No appeal will lie from an interlocutory order or ruling granting, dissolving or modifying injunctions which do not constitute the whole relief sought in the proceeding. See Section 1332, Gibson's Suits in Chancery, 5th Ed. As said therein "to allow appeals from every ruling of the chancellor from the beginning of the suit to the final decree would be to absolutely clog the wheels of justice; suits would become interminable; the appellate courts would be overwhelmed by an avalanche of appeals."

4. Finally, and more important here, is the jurisdiction of this Court to entertain this petition. By Chapter 100 of the Public Acts of 1925, there was created in this State an appellate court styled "the Court of Appeals" as now set out in T.C.A. 16-401, et seq. The jurisdiction of that court is set out in Section 16-408 as extending to all civil cases, except those matters specifically excluded in said section.

Appellate jurisdiction of civil cases in Chancery Court in which pleadings presented issues of fact to be determined upon proof to be heard by the court was in the Court of Appeals and not in the Supreme Court. See 206 Tenn. 680, 337 S.W.2d 239, and many other cases to the same effect.

This memorandum is written in response to the respectful request of counsel pursuant to the denial of the writ as endorsed on the original petition on March 12, 1964.

Weldon B. White,
Justice

APPENDIX B

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

Howard Rubin, d/b/a
Howard Rubin & Company,

Complainant

vs: No. 66560-2 R.D.

Carpenters Local Union No. 345
Of The United Brotherhood of
Carpenters and Joiners of America,
and H. A. Kellum, President,
Otto Schlafer, Business Agent,

Defendants

AFFIDAVIT

STATE OF TENNESSEE:
COUNTY OF SHELBY:

Your affiant, Howard Rubin, makes oath as follows:

That he sub-contracted all work to be performed under the subject contract with the owner. That in doing so, he let all work out for bids, not restricting same to Union or Non-Union labor. That he accepted the low bids on the various types of work to be performed. That the electrical work was let to a union sub-contractor. That the work not yet contracted for will go to the low bidder, regardless of union or non-union status. That to this date there has not been $50,000.00 worth of materials purchased for the job, from in State or from out of State, and that your affiant will not have purchased $50,000.00 worth of materials from Out of the State at the time the job is completed. As to the amounts of materials purchased from out of State by affiant sub-contractor, your affiant has no knowledge.

Further your deponent sayeth not.

.....
Howard Rubin

Sworn to and subscribed before me this 4th day of February, 1964.

.....
Notary Public

My commission expires:

APPENDIX B1

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

Howard Rubin, d/b/a
Howard Rubin & Company,

Complainant

vs. No. 66560-2 R.D.

Carpenters Local Union No. 345
Of The United Brotherhood of
Carpenters and Joiners of America,
and H. A. Kellum, President,
Otto Schlafer, Business Agent,

Defendants

AFFIDAVIT

STATE OF TENNESSEE:
COUNTY OF SHELBY

Your affiant, Al H. Thomas, makes oath as follows:

That as attorney for complainant, Howard Rubin, I contacted Otto Schlafer, one of the above-captioned defendants, by telephone on Wednesday afternoon, January 29, 1964. That in my conversation with Mr. Schlafer, I asked Mr. Schlafer what he was seeking by his picket. Mr. Schlafer replied that he was interested in seeing Mr. Rubin hire carpenters from Local Union # 345. I then inquired of Mr. Schlafer if his carpenters would work with other carpenters who were not members of a Union. Mr. Schlafer's reply was in the negative.

I then inquired of Mr. Schlafer if all of the carpenters on the job were members of his Union, would they be willing to work if other laborers on the job did not belong to a Union of their respective trades. Mr. Schlafer at first replied in the negative and then corrected himself to say that I will have to talk to my attorney about that matter.

There was then further conversation as to the possibility of Mr. Schlafer meeting with Mr. Rubin, which meeting never materialized.

Further your deponent sayeth not.

.....

Al H. Thomas

Sworn to and subscribed before me this 4th day of February, 1964.

.....

Notary Public

My commission expires:

.....